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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Jeremy Thacker,

16 Plaintiff,

17 v.

18 GPS Insight, LLC; Robert J. Donat,
19 Individually and as Trustee of The
20 Robert Donat Living Trust Dated April
21 19, 2017,

22 Defendants.

No. 2:18-cv-00063-PHX-DGC

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION *IN LIMINE*
NO. 4 – SPOILIATION**

23 Plaintiff offers no authority to support the premise of his motion: that if a party
24 does not seek a spoliation *sanction*, it cannot present *evidence* that a party destroyed
25 evidence to the jury. These are two distinct issues. *Wichansky v. Zowine, et al.*, CV-13-
26 01208-PHX-DGC, 2016 WL 6818945, at *11 (D. Ariz. Mar. 22, 2016) (denying a motion
27 for sanctions but concluding that the “grievance about the missing recording can be
28 presented to the jury through evidence and argument, with no need for the Court to place
its thumb on the scale with an adverse inference instruction.”). Defendants can present
the evidence regardless whether they seek or obtain an adverse inference instruction. The
Court’s analysis of the motion can, and should, end here.

Plaintiff destroyed two types of evidence. First, the same day Plaintiff preserved
other evidence, he wiped his work computer. Plaintiff claims he “provided Defendants
with all information from his work computer...” Mot. at 2:7. Not quite. At his

1 deposition, Plaintiff testified that he “provided a copy of all ***work-related*** information” to
 2 GPSI, but that he deleted “my personal information” so it could not be “obtained by a
 3 jealous owner and used against me...” (Plaintiff Depo. at 15-17 (emphasis added),
 4 attached as **Exhibit A**). Among the information Plaintiff irretrievably deleted were
 5 conversations where there were “[o]ther employees talking about [Donat] or ... [about]
 6 my personal relationship, just personal conversations for the most part” because Plaintiff
 7 didn’t want “him having access to that.” (*Id.* at 16). Second, in February 2017 when
 8 Defendants believe Plaintiff was contemplating this lawsuit, Plaintiff irretrievably deleted
 9 Slack messages among himself and his key witnesses, Kristin Lisson and Robert Dennis
 10 for the “[s]ame reason [he] gave for the other” evidence destruction.¹ (*Id.* at 18-20).

11 The mere fact that Plaintiff recognized the Slack messages and information on the
 12 computer could be used against him shows: (1) he knew he was going to file a case where
 13 it could be used against him; and (2) the information was relevant to the case.² From the
 14 other information Plaintiff did not delete, we know both are true. Plaintiff’s destruction
 15 of evidence is relevant to the jury’s evaluation of his credibility and candor.³ *Anderson*
 16 *v. Prod. Mgmt. Corp.*, 2000 WL 492095, 5 (E.D. La. 2000) (denying request for adverse
 17 inference instruction; but “because evidence of the fact of destruction is relevant with
 18 respect to [a party’s] credibility and reliability, plaintiffs will have the opportunity to
 19 present the fact of inadvertent destruction . . . to the jury”); *U.S. v. Hsia*, 2000 WL 195068,
 20 2 (D.D.C. 2000) (“The Court also agrees with the government’s arguments that the

21 _____
 22 ¹ Plaintiff’s motion relates solely to *his* efforts to destroy evidence. The evidence at trial
 23 will be that his two key witnesses, Kristin Lisson and Robert Dennis, also destroyed or
 24 helped Plaintiff destroy evidence.

25 ² Plaintiff contends his supposed ignorance of the duty to preserve evidence is an excuse.
 26 (Mot. 2:2-4) At best, arguments about Plaintiff’s culpable mental state go to whether the
 27 Court should give an adverse inference instruction, not whether the evidence can be
 28 presented. *See* Fed. R. Civ. P. 37(e)(2).

³ Plaintiff raises the red herring of alleged spoliation by Defendants. *See* Mot. at 2:11-
 25. There has been none. Regardless, Plaintiff presents no authority that this would be
 relevant to whether the jury hears of *his* actions, because it is not. *See Wichansky*, 2016
 WL 681945 at 11 (separately addressing each parties’ alleged spoliation). As such,
 Defendants will not wade into the allegations again. *See, e.g., Docs.* 152 at 7-8
 (addressing sales policy) and 101 at 2 (Slack).

evidence of alteration, destruction or creation of documents is relevant to the impeachment of [the credibility of] certain witnesses”).

As this Court’s decisions show, the jury should be permitted to hear this evidence regardless whether Defendants seek, or the Court gives, an instruction. In addition to *Winchansky*, this Court has on several occasions recognized the distinction between evidence of spoliation and a sanction based upon spoliation. In *Tipp v. Adeptus Health Inc.*, CV-16-02317-PHX-DGC 2018 WL 447256, at *5 (D. Ariz. Jan. 17, 2018), the Court denied a motion for a directed verdict or adverse inference jury instruction that had been presented at the summary judgment stage, but held that the evidence of spoliation would be presented to the jury:

Plaintiff will be permitted at trial to present evidence of Ms. Scott’s destruction of the handwritten notes and, at a minimum, to argue to the jury that the notes could have been helpful to her case. The Court will decide at trial, or at the final pretrial conference if possible, whether it will give an adverse inference instruction in light of all the evidence and, if so, the precise form of that instruction.

(Emphasis added). And in *Pettit v. Smith, et al.*, CV-11-02139-PHX-DGC, 45 F. Supp. 3d 1099, 1111 (D. Ariz. 2014), the Court denied a request for case-dispositive sanctions but concluded that “loss of evidence should be explained to the jury” and “that the jury should be allowed to infer that the lost evidence would have favored Plaintiff’s position.”

This trio of cases confirms the obvious—that even losing a motion for sanctions does not preclude evidence of spoliation before the jury. Defendants were not required to file a motion for any adverse inference instruction in advance of the trial. That request is appropriate after evidence has been presented at trial. *See Tipp*, 2018 WL 447256, at *5; *Pettit*, 45 F. Supp. 3d at 1111; *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 526 (S.D. W. Va. 2014). Defendants had intended to wait until the evidence had been presented, but Defendants are now contemporaneously filing such a motion. Regardless, because filing a motion for sanctions is irrelevant to the presentation of evidence of spoliation, Plaintiff’s Motion in Limine No. 4 should be denied.

1 RESPECTFULLY SUBMITTED this 5th day of December, 2019.

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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on December 5, 2019, I caused the foregoing document to be
17 filed electronically with the Clerk of Court through ECF; and that ECF will send an
18 e-notice of the electronic filing to:

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